E-filed: April 21, 2010

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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:

STATION CASINOS, INC.,
Debtor.

- ☐ Affects this Debtor
- ☒ Affects all Debtors
- ☐ Affects Northern NV Acquisitions
- ☐ Affects Reno Land Holdings, LLC
- ☐ Affects River Central, LLC
- ☐ Affects Tropicana Station, LLC
- ☐ Affects FCP Holding, Inc.
- ☐ Affects Fertitta Partners, LLC
- ☐ Affects Station Casinos, Inc.
- ☐ Affects FCP Mezzco Parent, LLC
- ☐ Affects FCP Mezzco Parent Sub, LLC
- ☐ Affects FCP Mezzco Borrower VII, LLC
- ☐ Affects FCP Mezzco Borrower VI, LLC
- ☐ Affects FCP Mezzco Borrower V, LLC
- ☐ Affects FCP Mezzco Borrower IV, LLC
- ☐ Affects FCP Mezzco Borrower III, LLC
- ☐ Affects FCP Mezzco Borrower II, LLC
- ☐ Affects FCP Mezzco Borrower I, LLC
- ☐ Affects FCP Propco, LLC

Chapter 11

Case No. BK-09-52477

Jointly Administered
BK-09-52470 through BK-09-52487

BOYD GAMING CORPORATION'S OBJECTION TO MOTION FOR ORDER ESTABLISHING BIDDING AND DEADLINES RELATING TO SALE PROCESS FOR SUBSTANTIALLY ALL OF THE ASSETS OF STATION CASINOS, INC., AND CERTAIN "OPCO" SUBSIDIARIES

Date: **May 4, 2010**
Time: **2:00 p.m.**
Place: 300 Booth Street
Reno, NV 89509

BOYD GAMING CORPORATION ("Boyd"), by and through its counsel, Snell & Wilmer L.L.P., hereby submits its Objection (the "Objection") to the Debtors' Motion For Order

Establishing Bidding and Deadlines Relating to Sale Process For Substantially All of The Assets of Station Casinos, Inc. And Certain "Opco" Subsidiaries [Docket No. 1175] (the "Bid Procedures Motion").[1]

This objection is supported by the accompanying Memorandum of Points and Authorities, the Declarations of J. Soren Reynertson ("Reynertson Decl."), Brian Larson ("Larson Decl.") and David Farlin ("Farlin Decl." together with the Reynertson Decl. and Larson Decl., the "Boyd Declarations"), all pleadings and papers of record, and any oral argument the Court may entertain.

DATED this 21st day of April, 2010.

SNELL & WILMER L.L.P.

By: _____

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[1] Two days before the deadline for filing this brief, the Debtors filed substantially revised versions of the operative documents that are the subject of the Bid Procedures Motion and the Amendment Motion (defined herein). Boyd has reviewed the revised documents but found nothing that resolved our objections. Given the short time and inadequate notice, Boyd reserves the right to supplement this Objection with a more detailed response to the new filings in due course.

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I. PRELIMINARY STATEMENT

It is no secret that Boyd is very interested in acquiring not only the Opco Properties[2] (including a majority of the Excluded Assets), but, if given the opportunity, substantially all of SCI's Propco Assets for the market value of such assets. However, after reviewing the Bid Procedures Motion, Boyd questions whether it will be given the same opportunities as the Insiders[3] to compete fairly for any of the Debtors' assets.[4]

Debtors-in-possession have a fiduciary duty to maximize the value of their assets for the benefit of the creditors; however, as currently drafted, the Bidding Procedures fail to meet this objective. The Debtors assert that the Bidding Procedures promote a "competitive, fair and open sale process."[5] Unfortunately, nothing could be further from the truth. Instead, the Bidding Procedures evidence the Debtors' overwhelming disinterest in running a truly competitive process. The Debtors are advancing Bidding Procedures clearly intended to facilitate an insider-led condemnation of assets from Opco to Propco that chills bidding for the Opco Properties, slants the playing field in favor of the Insiders and circumvents any competitive bidding for the Excluded Assets belonging to the Opco estate. Moreover, the Debtors propose these Bidding Procedures under a cloak of inadequate disclosure and a failure to provide any reasonable justification or explanation for this blatant harm to the Opco estate. While Boyd understands that this is not a forum for airing the grievances of competing bidders, as a creditor Boyd is very

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[2] Capitalized terms not otherwise defined herein shall have the meaning set forth in the Bid Procedures Motion or the Plan.

[3] The defined term "Insiders" has the meaning set forth in 11 U.S.C. § 101(31)(B), and includes Fertitta Gaming, LLC ("Fertitta Gaming"), and its owners Frank J. Fertitta (SCI's Chairman of the Board, Chief Executive Officer, and President) and Lorenzo J. Fertitta (SCI's Vice Chairman of the Board of Directors and a director).

[4] Boyd has been, and still remains, interested in acquiring the Opco assets and, if Propco assets become available, both the Propco and Opco assets. However, as expressed in Boyd's objections to the Debtors' pending motions, Boyd has concerns about the adverse impact on the value of Opco due to the proposed transfers of Excluded Assets from Opco to Propco, as well as the defects in the Debtors' proposed bidding procedures. Boyd believes that the Debtors' proposed process to acquire Opco assets will fail to meet even the Debtors' professed standard of being competitive, open and fair. Unless the defective elements of the Debtors' proposal are resolved, Boyd may choose, and believes that other non-insider bidders may choose, not to pursue the acquisition of the applicable assets.

[5] *See* Declaration of Daniel Aronson In Support Of Order Establishing Bidding and Deadlines Relating to Sale Process For Substantially All of The Assets of Station Casinos, Inc. And Certain "Opco" Subsidiaries, [Docket No. 1177, ¶ 10].

concerned that the Bidding Procedures (as proposed) will chill competitive bidding to the detriment of the Debtors' estate.

The Plan makes it very clear that, upon its emergence from bankruptcy protection, SCI (defined below) will be broken up into New Propco and New Opco. New Propco must not be able unilaterally to dictate the composition of New Opco, but if the Excluded Assets are transferred from Opco to New Propco, then that is exactly what will happen. Moreover, because the Court has yet to approve the Disclosure Statement, it is not appropriate for the Court to sanction such a plan-determinative event at this premature juncture in the case, especially when the primary beneficiaries of the Plan are the Insiders and many important details have yet to be disclosed by the Debtors.

New Propco (made up of only four (4) casinos) will be formed utilizing the Master Lease Collateral and the Operating Subsidiaries Lease Collateral, together with the Excluded Assets. The fundamental problem is that the majority of the Excluded Assets belong to Opco and are integral to the operations of SCI's fourteen (14) Opco properties. By not allowing anyone to bid on the Excluded Assets, the Bidding Procedures pre-approve the contemplated transfer of the more valuable and strategic Opco assets to New Propco at a less than reasonably equivalent value, and make it nearly impossible to claw back the Excluded Assets into the Opco estate. This would leave Opco as a "shell" of its former self. Interested bidders will not be bidding on a fully operational Opco, but on only a skeleton of Opco that will require a potential acquirer to rebuild the Opco infrastructure in order to allow Opco to function properly. It is counterintuitive and a perversion of common sense to think that four casinos actually need all of the Excluded Assets in order to operate. Ironically, this process began with Opco (the larger segment of SCI) agreeing to provide Propco (the smaller SCI segment) with transition services, but now that the Insiders have locked up Propco, the loss by Opco of the Excluded Assets will cause Opco to require transition services from Propco, thereby necessitating the dependence of a non-insider buyer upon its competitor for those essential services.

By sanctioning the asset transfer to New Propco, the Bidding Procedures provide New Propco with an enormous advantage over any other bidder for the Opco Properties because New

Propco not only obtains possession of the missing pieces of the puzzle without having to compete against interested third parties for such assets, but it also avoids bearing the significant cost that a competing bidder would bear of putting in place a replacement infrastructure to support the Opco Properties.

Moreover, given that the proposed Bidding Procedures allocate a significant amount of control and discretion to the Debtors that allows them to favor Insider bids, those Bidding Procedures must be reformed to create a more level playing field for all third-party bidders and ensure that the process does not shift the likelihood that the Insiders will be the Successful Bidder at a lower price than a non-Insider would pay in a reformed process (especially if the more strategic "Excluded Assets" were retained by Opco). A debtor whose principals are also participants in the auction must not be allowed to retain effective control over the most critical decisions in this process. Otherwise, the overwhelming conflicts of interest will taint the integrity of the process and disadvantage non-insider third party bidders. If the Debtors want a truly fair, open, and competitive process, then they should allow all of their assets to be exposed to the market as part of a process run by an independent, neutral arbiter.

The Boyd Declarations demonstrate why the relief sought by the Debtors should not be granted without first implementing major reforms, both as to process and as to the scope of the Excluded Assets.

II. FACTUAL BACKGROUND

A. Corporate Structure

1. Station Casinos, Inc. ("SCI") is the lead debtor in these Chapter 11 cases, and the other debtors are all either direct or indirect wholly owned subsidiaries of SCI. SCI is made up of three primary "stacks" — SCI is the operating arm of this enterprise; Propco, as noted below, holds certain real property; and CV Propco, LLC ("Landco"), owns land located on the southern end of Las Vegas Boulevard at Cactus Avenue, as well as land surrounding Wild Wild West in Las Vegas.[6]

[6] *See* Disclosure Statement, p. 27.

2. In 2007, SCI undertook a going-private transaction (the "2007 Transaction") that involved the sale of certain real property to FCP Propco, LLC ("Propco"), and the leaseback of such property to SCI.

3. As a result of the 2007 Transaction, 24.1% of the issued and outstanding shares of non-voting common stock of SCI are owned by debtor Fertitta Partners LLC ("Fertitta Partners"),[7] and the remaining 75.9% of non-voting common stock is owned by debtor FCP Holding, Inc. ("FCP Holdco"). The voting common stock is held by debtor FCP Voteco LLC ("FCP Voteco").[8]

4. At the same time as the 2007 Transaction, Propco, as landlord, and SCI, as tenant, entered into a Master Lease, dated as of November 7, 2007 (the "Master Lease"), under which Propco leased to SCI the real property and improvements associated with four properties — Boulder Station Hotel & Casino, Red Rock Casino Resort Spa, Palace Station Hotel & Casino and Sunset Station Hotel & Casino (collectively, the "Leased Hotels"). SCI, together with its non-debtor operating subsidiaries (the "Operating Subsidiaries"), operates the Leased Hotels.

5. As described in the Special Litigation Committee's report concerning the Master Lease, the Leased Properties are owned by Propco, and SCI only has the right to exclusive possession and use of the Leased Properties; SCI owns all of the improvements made by SCI until the expiration of the Master Lease, at which time title of those improvements transfers to Propco; and SCI owns its personal property, subject to any security interest that Propco has in some, but not all, of SCI's furniture, fixtures, and equipment.[9]

6. As part of the Master Lease, SCI pledged, assigned, and granted to Propco a security interest and an express contractual lien in and to (i) all of the personal property (including furniture, fixtures, goods, inventory, equipment, furnishings, objects of art, machinery,

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[7] Fertitta Partners is owned by affiliates of Frank J. Fertitta III, Chairman, Chief Executive Officer, and President of SCI. *See* Disclosure Statement, p.22.

[8] FCP Voteco is owned equally by Frank J. Fertitta III ("FJF"), Lorenzo J. Fertitta ("LJF"; together with FJF, the "Fertittas"), and Thomas J. Barrack, Jr. (Chairman and Chief Executive Officer of Colony Capital, LLC ("Colony"). *Id.*

[9] *See* Supplemental Report of Investigation by the Special Litigation Committee of the Board of Directors of Station Casinos, Inc., dated December 18, 2009 [Docket No. 730, p.5].

appliances, appurtenances, and signage) together with tools and supplies related to the Leased Hotels and (ii) the FF&E Reserve Collateral (collectively, the "Master Lease Collateral").

7. Concurrently with the execution of the Master Lease, Propco and the Operating Subsidiaries entered into the Security Agreement, dated November 7, 2007, granting Propco liens on and security interests in all of their personal property related to the Leased Hotels owned by the Operating Subsidiaries, as well as FF&E Reserves for each of the Operating Subsidiaries (collectively, the "Operating Subsidiaries Lease Collateral").

8. During these bankruptcy cases, SCI's prepetition lenders notified SCI that they would not consent to payment of the December 2009 rent under the Master Lease, thus prompting negotiations between and among SCI and Propco's independent directors to structure an agreement that would allow for the continued operation of the Leased Hotels in a manner that would protect and preserve the value of those operations.[10]

9. The end result of these parties' efforts was the Master Lease Compromise Agreement (the "MLCA"),[11] which, in part, reduced the rent payable to Propco and crafted a transition service protocol in the event that SCI rejected the Master Lease. The MLCA provides, in pertinent part, that upon the occurrence of certain conditions, SCI and the Operating Subsidiaries will cooperate in a consensual foreclosure of Propco's liens on such collateral and will sell outright certain tangible and intangible personal property. In separate papers, Boyd also is opposing the Debtors' pending motion (as modified) to amend yet again the MLCA and transfer more Excluded Assets from Opco to New Propco, which would further harm Opco for the benefit of Propco and the Insiders.

B. Boyd's Offers

10. On February 23, 2009, Boyd delivered a non-binding preliminary indication of interest (the "Indication of Interest") to SCI's board of directors expressing its desire to acquire substantially all of the Opco Properties. In addition, as part of the Indication of

[10] *See* Disclosure Statement, p. 34.

[11] The Debtors recently filed a motion to further amend the MLCA (the "Amendment Motion"). Boyd objected to the further amendment of the earlier compromise and the transfer of more Excluded Assets from Opco to New Propco, thus further burdening Opco for the benefit of Propco and New Propco Insiders.

Interest, Boyd also stated that if SCI chose to pursue a separate sale transaction with respect to the Propco Assets, Boyd would consider an acquisition that includes those assets as well.[12]

11. On February 24, 2009, SCI filed a Form 8-K indicating that it intended to "continue to work with its lenders and bondholders to pursue the previously proposed plan of reorganization, but would evaluate the terms of the Boyd proposal."

12. On March 3, 2009, SCI advised Boyd that SCI's board reviewed the Indication of Interest and concluded that it was in the best interests of SCI and its stakeholders to proceed with SCI's contemplated restructuring plan. SCI's letter to Boyd noted that SCI's board did not make a determination to pursue, nor had the Company taken any steps toward pursuing, a sale of all or any portion of SCI's assets. Rather, the letter stated that SCI was in the process of soliciting consents from its lenders with respect to a pre-packaged plan of reorganization that would result in a restructuring of substantially all of SCI's debt.[13]

13. On December 16, 2009, Boyd delivered a second, non-binding proposal (the "Proposal") to SCI's board of directors wherein Boyd reaffirmed its interest in acquiring, when permitted, substantially all of SCI's "Opco Properties" and "Propco Assets"[14] free and clear of all liens, claims, and encumbrances for a total of $2.45 billion in cash and assumed debt.[15]

C. The Plan

14. On March 24, 2010, the Debtors filed the Joint Chapter 11 Plan of Reorganization for Station Casinos, Inc., and its affiliated Debtors (the "Plan") and the Disclosure Statement to Accompany Joint Chapter 11 Plan of Reorganization for Station Casinos, Inc., and its affiliated Debtors (the "Disclosure Statement").

15. Consistent with the terms of the MLCA, the Plan provides that on the Effective Date (as defined in the Plan), SCI and its Non-Debtor Affiliates will transfer assets included in the Master Lease Collateral to Propco in satisfaction of its liens on such assets.

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[12] Boyd Gaming Corp., Current Report (Form 8-K), at Ex. 99.1 (Feb. 23, 2009).

[13] Station Casinos, Inc., Current Report (Form 8-K), at Ex. 99.1 (Mar. 3, 2009).

[14] The Proposal did not include those assets that secure SCI's $250 million delay-draw term loan due February 7, 2011, and all litigation claims unrelated to the Propco Assets and the Opco Assets.

[15] Boyd Gaming Corp., Current Report (Form 8-K), at Ex. 99.1 (Dec. 16, 2009).

16. However, and more importantly, the Plan also provides that the New Propco Purchased Assets (which are not specifically identified in the Plan)[16] shall be sold, conveyed, assigned, transferred, and delivered "free and clear" to New Propco or its designee.[17] Similarly, the Plan also contemplates the transfer of portions of the Wild Wild West assemblage held by SCI and its subsidiaries to the restructured Land Loan Borrower[18] or a subsidiary thereof, including (i) the Wild Wild West real estate and ground leasehold and casino and other operating related assets held by non-debtor Tropicana Station, Inc. (the operator of the Wild Wild West Casino), and (ii) the option to purchase other related property located within the boundary of or adjacent to the Wild Wild West assemblage, at a price to be mutually agreed upon by the Propco Lenders and SCI.

17. The Plan, as it relates to SCI, simply provides for an orderly going concern sale process for all of the New Opco Acquired Assets, which are defined in the Plan as "all or substantially all of the assets of SCI and the Other Opco Debtors other than the New Propco Purchased Assets and the Master Lease Collateral."[19]

D. Excluded Assets

18. In order to effectuate the sale of the Opco Properties, the Debtors filed the Bid Procedures Motion to seek approval of an auction process to sell the Opco Properties (the "Bidding Procedures").[20]

19. In the amended Bidding Procedures, the Debtors designated the Propco Lenders and Fertitta Gaming as the "Stalking Horse Bidder" for the Opco Properties.

20. Schedule 2 to the Bidding Procedures identifies seventeen (17) Opco asset categories that are to be excluded from an SCI sale. Though it is not entirely clear from the Plan

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[16] As discussed below, the only reasonable inference to be drawn from these documents is that the New Propco Purchased Assets are to be comprised of the Excluded Assets set forth in Schedule 2 to the Bidding Procedures.

[17] *See* Disclosure Statement, p. 55-56.

[18] The Plan also provides that the Land Loan Borrower (Landco) or the assets constituting collateral under the Land Loan will be transferred to New Propco or a subsidiary thereof at the direction of the holders of the Land Loan (Deutsche Bank Trust Company Americas and JP Morgan Chase Bank, N.A.)

[19] *See* Disclosure Statement, Plan, p. 16.

[20] On April, 19, 2010, the Debtors filed amended Bidding Procedures. [Docket No. 1214].

and Disclosure Statement, it seems that the seventeen (17) asset categories set forth in Schedule 2 to the Bidding Procedures likely comprise the New Propco Purchased Assets.

21. While there is a shocking lack of disclosure about the relevant details of these dramatic, insider benefits at the expense of the Opco creditor recoveries, the Debtors do not hide from the fact that these asset categories go well beyond the assets encumbered by Propco pursuant to the Master Lease and the Security Agreement. *See* Motion, ¶ 15 ("The Excluded Assets consist entirely of assets that are to be transferred to Propco or New Propco under the Joint Plan and/or pursuant to the Master Lease Compromise Agreement and all amendments thereto approved by the Bankruptcy Court"). What the Debtors fail to discuss is that these categories include assets of significant value, both economic and strategic, including (i) the Wild Wild West real property and assets, (ii) IT systems, (iii) other intellectual property, (iv) the primary customer databases, (v) business information, (vi) Landco's real property and assets, and (vii) unencumbered fixtures, furniture, and equipment.

22. For the reasons discussed herein, Boyd asserts that the Bid Procedures Motion must be denied without prejudice, and the Debtors must be required to modify the Bidding Procedures in order to create a more fair and unbiased process in which non-insider third parties have an equal opportunity to bid for all of the assets of Opco on an informed basis, including all assets not pledged as collateral to the Propco Lenders under the Master Lease and the Security Agreement.

III. ARGUMENT

A. The Bidding Procedures Must Be Denied Because They Do Not Maximize Value for Opco's Estate; Rather, the Bidding Procedures Sanction Propco's Condemnation of Significant Value from Opco, Especially in the "Excluded Assets" of Opco.

The Plan contemplates that New Propco will be reorganized and re-constituted by utilizing the assets obtained from the foreclosure of the Master Lease Collateral and the Operating Subsidiaries Lease Collateral, the sale of certain real and personal property from Opco to New Propco or its designee, and the transfer of certain additional assets from Opco to New Propco.[21]

[21] *See* Disclosure Statement, pp. 55-57.

Noticeably absent from this plan structure (as well as from the Bidding Procedures) is the opportunity for third parties to bid for the assets being transferred from Opco to New Propco, especially the strategically and economically valuable Excluded Assets.

As a debtor-in-possession, SCI has a fiduciary duty to all of its creditors to maximize the value of its estate. *In re Watson,* No. 04-62118-13, 2006 Bankr. LEXIS 3202, at *9 (Bankr. D. Mont. Mar. 22, 2006) ("As fiduciaries, debtors have an obligation to conserve the assets of the estate and to maximize distributions to creditors."); *United States v. Aldrich (In re Rigden)*, 795 F.2d 727, 730 (9th Cir. 1986); *Kalyna v. Swaine (In re Accomazzo)*, 226 B.R. 426, 429 (D. Ariz. 1998); *In re Benny*, 29 B.R. 754, 760 (N.D. Cal. 1983), *aff'd sub nom, United States v. Benny*, 786 F.2d 1410 (9th Cir. 1986); *see also 7 Collier on Bankruptcy* P 1118.09 (15th Ed. 1996)). In addition, "[w]hen a debtor desires to sell an asset, its main responsibility, and the primary concern of the bankruptcy court, is the maximization of the value of the asset sold." *In re Integrated Res., Inc.*, 135 B.R. 746, 750 (Bankr. S.D.N.Y.), *aff'd* 147 B.R. 650 (S.D.N.Y. 1992); *see also In re Sagewood Manor Assocs. LP*, 223 B.R. 756, 762 (Bankr. D. Nev. 1998) ("In *Toibb v. Radloff*, the court stated that Chapter 11 embodies the general policy of the Bankruptcy Code, which is to maximize the value of the bankruptcy estate." *Toibb v. Radloff*, 501 U.S. 157, 163 (1991)). Maximum value requires competitive bidding. However, the Debtors' process denies competitive bidding for the Excluded Assets, thus chilling bidding overall and reducing the Opco creditor recoveries.[22]

The Debtors assert that the Bidding Procedures, as drafted, fulfill their fiduciary duty, *see* Motion, ¶ 20. However, by excluding Opco assets of significant value, as well as the Propco Assets, from the proposed SCI sale, the Debtors are not allowing their assets to be shopped as their fiduciary duty requires. At least one court has held that "no shop" clauses interfere with a debtor's fiduciary duty. *Pacificorp Ky. Energy Corp. v. Big Rivers Elec. Corp.* (*In re Big Rivers Elec. Corp.)*, 233 B.R. 739, 752 (W.D. Ky. 1998). The Bidding Procedures operate as a type of "no shop" because through them, the Debtors cut off their right to initiate, solicit, or negotiate

[22] *See* Reynertson Decl., ¶ 12.

offers and proposals for the sale of the assets being transferred to New Propco under the terms of the Plan. *See id.*

Any asset that is not a part of the Master Lease Collateral or the Operating Subsidiaries Lease Collateral should not be included in the list of Excluded Assets and must be exposed to the market with full disclosure in order to ensure that the Debtors' estate receives market value for such assets; otherwise, the SCI estate risks losing significant value and denying its creditors the opportunity to maximize the value of SCI's assets.[23] For the reasons discussed herein, before the Court approves the Bidding Procedures (including the list of Excluded Assets), Propco and Opco must explain to this Court and their creditors why each of the following assets should be transferred to Propco without first exposing them to the market with all relevant data. In addition, if the Court permits Opco assets to be excluded from the contemplated Opco sale, then in order to prevent Propco from receiving a windfall, the Court should ensure that Propco is providing Opco with the fair market value of such assets and/or the cost to Opco of acquiring comparable assets, as well as full indemnity for Opco as to the harm Opco suffers from the loss of the Excluded Assets.

Item 10: IT Systems. **This is the single biggest outrage in the Bidding Procedures.** The Debtors believe it is appropriate to transfer and shift Opco's entire core IT system and capability to Propco (and New Propco and its insiders). As a result, Opco will need to replace and rebuild its own IT systems in order for its remaining systems to properly function. In effect, Propco is taking the turnkey system for its use, forcing Opco to depend on Propco and New Propco for Opco's IT needs as it rebuilds its own system. To the astonishment of Opco creditors, Appendix 1 to the most recent amendment to the Master Lease states: ". . . Propco will not separately reimburse Opco for such costs." (emphasis added)

One of the core values of the Opco Properties is in its IT and IP assets.[24] As discussed in greater detail herein, these IT assets are critical to the operation of each Opco casino because its core functions are dependent on IT systems.[25]

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[23] *See* Reynertson Decl., ¶ 17.

[24] *See* Farlin Decl., ¶ 10.

The development of proprietary IT and IP assets can involve substantial costs over long periods of time. For example, the development of a commercially available casino management system to support multi-property casino operations, including player tracking systems and website infrastructure, would cost up to $20 million per reasonably sized property. From this perspective and others, Opco's IT and IP assets are very valuable and desirable.[26] For example, if the Opco IT and IP assets are transferred away from the Opco Properties, as contemplated by the Second Compromise Amendment, those transfers would strip so much IP and IT asset value away from the Opco Properties that Opco would need to rebuild Opco's IT systems and obtain "transition services" from Propco in order to prevent the Opco Properties from "going dark."[27] These IT and IP assets represent key IT and IP assets for a property within the hotel and casino business. To allow this critical component of Opco's infrastructure to be transferred to Propco will bestow a significant windfall on Propco (and New Propco Insiders) at an enormous cost to Opco and in a manner that chills bidding by non-insider bidders for the remainder of Opco.[28] Propco should not be able to burden Opco in this manner, especially without detailed disclosures and full reimbursement of investments and broad indemnity for Opco.

Item 13: Wild Wild West Real Property and Assets: Because Wild Wild West is a standalone casino, the loss of its assets could be endured by an Opco buyer; however, the value of the Wild Wild West assets to the Insiders is significant. Landco (now part of the New Propco-Insider deal) needs the Wild Wild West land and casino in order to develop the large, adjacent Landco acreage as a hotel/casino.[29]

The apparent strategic value of the Wild Wild West assets could be many times higher than the value of the Wild Wild West assets as a stand-alone existing casino, and the Debtors should be required to disclose to the Court how much it has invested in the planned Viva casino

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[25] *See* Farlin Decl., ¶ 9.

[26] *See* Farlin Decl., ¶ 10.

[27] *See* Farlin Decl., ¶ 11.

[28] *See* Reynertson Decl., ¶¶ 13-16.

[29] *See* Larson Decl., ¶¶13-14 (describing what the Debtors have failed to disclose about this strategic asset).

development. Propco should not be able to grab this Opco asset based on its limited value as a small and old casino. Indeed, to the extent that Opco has spent any funds on development activities, including for option fees on the Wild Wild West or legal, engineering, architectural, planning, and other work product related to its further development, the products of those would become a windfall gift to the Insiders under the Debtors' Motions and the Plan. One would expect an Insider buyer to at least reimburse the Opco creditors for any amounts invested by Opco in creating this windfall development opportunity for that buyer.[30] Because the bankruptcy precedents require "strict scrutiny" of sales of estate assets to insiders, especially without competitive bidding, the Insiders, in attempting to transfer these Opco assets to their New Propco, must first make full disclosure of all relevant facts concerning these transfers.[31]

Item 6: Patents. Opco's patents cover its proprietary player-tracking system and other techniques for more profitable casino operations than the standard systems that Propco could readily acquire like any other start-up casino. Propco has requested an unrestricted, perpetual fully paid-up license for all patents necessary to access Opco's existing IT system, including the U.S. Patents and patent applications related to player-tracking systems. A player-tracking system allows a casino to manage, maintain and cultivate its relationship with its players by providing information about player activity such as type of wager, type of game or race, frequency of play and other parameters. A player-tracking system is not necessary for the general operations of a hotel or casino, nor is a player-tracking system necessary to comply with the rules and regulations of the authorities within the gambling industry. In addition, there are several commercially available player-tracking systems available on the market, all of which will achieve the basic functionality of a player tracking system and meet any regulatory requirements required by authorities in the gaming industry. For example, to list a few of many commercially available alternatives, are the player tracking systems offered by Bally Technologies, Inc., International Game Technology (IGT), Aristocrat Technologies, Inc., and Konami Gaming, Inc.[32]

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[30] *See* Larson Decl., ¶ 16.

[31] *See* Larson Decl., ¶ 15.

[32] *See* Farlin Decl., ¶ 13.

If Opco is forced to grant this license, Opco will lose important competitive advantages to its New Propco competitor, and one more of the appealing aspects to potential bidders of acquiring Opco would be eliminated. If Propco is to be given rights to this category of assets, then at a minimum, Propco should reimburse Opco for the significant investment that Opco has made in developing the licensed technology with funding from Opco creditors.

Item 7: Other Intellectual Property. According to Annex 1 to the Second Compromise Agreement, Propco seeks the use of "existing website infrastructure (including online guest transaction and account management systems) and related software applications" within the Opco Properties and requests the right to not "re-create [the] website user interface from scratch." The website user interface for certain of the Opco Properties is very similar in look and feel to certain of the Propco Properties. Given the similarities in look and feel of the existing website user interface, if Propco is given these rights, potential customers who visit the websites of the Propco Properties may well be confused and assume that the Opco Properties and the Propco Properties are all part of the same enterprise. This would harm the Opco Properties and diminish the value of the Opco Properties. There are many generally available sources of software applications for website infrastructure (including online guest transaction and account management systems). These software applications can be provided by a variety of vendors, ranging from large companies like International Business Machines Corp. (IBM) to small advertising agencies to independent consultants specializing in website design. New Propco does not need the proprietary website infrastructure and related software applications within the Opco Properties in order to operate continuously and adequately websites for the Propco Properties.[33]

Propco also seeks a non-exclusive license of Opco's copyrighted matter so as to be able to further customize them for Propco's uses, including rights to enjoy Opco's source code and rights to create derivative works for Propco. If this is allowed, Propco, as a future competitor of Opco, will receive a valuable benefit that weakens Opco because Propco's creation of derivative works will reduce the unique "look and feel" of Opco's web assets at no apparent cost to Propco.[34]

[33] *See* Farlin Decl., ¶ 14.

[34] *See* Farlin Decl., ¶ 15.

Like the Patents, if this category of assets is to be excluded from the Opco Properties, then at a minimum, Propco should reimburse Opco for the investment that Opco has made in developing and maintaining these assets.

Item 8: Primary Customer Database. Player information is a valuable asset within the hotel and casino business.[35] Under the Debtors' proposed Bidding Procedures, information about Opco customers who have played "primarily" at Propco casinos (as defined for Propco's benefit) will be transferred to Propco as its "Primary Customers."[36] However, customers often play at more than one casino. Information about a Propco "Primary Customer" who is also a customer of Opco is of value to a buyer of Propco. Propco should not have the right to exclusive data on such Opco customers, including the "entire history of all property play" because the customers played more often at Propco casinos. Requiring this valuable Opco customer list and related information as it relates to Propco's "Primary Customers" who are also Opco customers, to be abandoned to Propco as the Debtors propose, would provide a windfall to Propco and diminish the value of that Opco asset. In addition, while the allocation of inactive customer accounts is not essential for the operation of the Propco Properties, such information about inactive accounts remains a valuable asset as to whoever holds the information. Requiring the transfer of inactive account information associated with the Opco Properties also reduces the value of the Opco Properties.[37]

In effect, under the Debtors' proposal, Propco walks away with the valuable information about many of the significant and other customers cultivated by Opco who also paid for their marketing and recruitment.

Item 9: Business Information. This includes more than merely giving Propco turnkey access to all of the data and documentation that it could ever possibly want. This also includes more IP license transfers with windfall opportunities for Propco, and more harm to Opco, as addressed throughout this Objection.

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[35] *See* Farlin Decl., ¶ 18.

[36] *See* Farlin Decl., ¶ 17.

[37] *See* Farlin Decl., ¶ 16.

For example, in item 9 of Annex 1 to the Second Compromise Amendment, Propco has requested splitting between the separate Propco Properties and Opco Properties "[a]ll information relating to tracking of operations (e.g., inventory, employee time, HR data, accounting and other Transaction Data as described on Annex A)" that is "tracking information relating to" the Propco Properties: business information, including without limitation HR programs documentation, training manuals and policies and procedures, physical plant and engineering documentation and processes, player development systems, processes and reporting, and other business information; and marketing and other art materials and construction contracts "to the extent related to" or "relating to" the Propco Properties. The examples of business information that Propco desires to receive and use are valuable assets, and they are not unique or specific to the Propco Properties. Although business information related to the Opco Properties might also be related to Propco in some way, under the Debtors' formulation, Propco would be justified in requiring the transfer or use of that business information from Opco to Propco to the diminishment of the Opco Properties.[38]

Moreover, the definition of Transaction Data described on Annex A is broadly defined and includes, among other things, player-tracking systems, slot and table games accounting systems, hotel reservations systems and all "front of house ops systems" such as casino accounting, cage and count, franchising and merchandising operation systems, performance management, and safety, security and surveillance systems, and CCTV infrastructure. All of these systems are not unique or specific to the Propco Properties and are generally commercially available from third-party vendors. For example, commercially available versions for many of these systems are generally available through companies such as Agilysys, Inc. or MICROS Systems, Inc. In addition, these systems represent assets that are employed enterprise-wide and cannot be separated from the enterprise without impairing their value. Splitting these assets between Propco Properties and Opco Properties will diminish their value and thus diminish the value of the Opco Properties. Also, because these assets are "front of house" and customer-

[38] *See* Farlin Decl., ¶ 19.

facing, there is a likelihood of consumer confusion if these systems are employed at both the Propco facilities and the Opco facilities. This consumer confusion will have a material negative impact on the value of the Opco Properties and the ability to operate the Opco Properties.[39]

Item 16: CV Propco, LLC Real Property and Assets. Landco owns land on the southern end of Las Vegas Boulevard, as well as land surrounding the Debtors' Wild Wild West property. As discussed above, the Wild Wild West property is a valuable asset, and its future development prospects are directly related to the land owned by Landco. Accordingly, while the present value of the Wild Wild West real property might not be significant as an isolated parcel, its value dramatically increases when it is added to the surrounding parcels owned by Landco, since the Wild Wild West parcel is the sine quo non of developing a casino project on the combined parcels.[40] Rather than simply allow New Propco to restructure the loan with the Land Loan Lenders, Opco should be given an opportunity to negotiate retention of Landco's real property interests based on its related Wild Wild West assets (described in Item 13 above) and preserve that value for Opco's creditors.

Item 11: Unencumbered FF&E. If the FF&E is not Propco lender collateral under Item 1 of the Excluded Assets, then it needs to be closely examined for appropriateness and value. One of many concerns now and until the closing is that the Debtors' "location" test of allocation between Opco and Propco allows the Propco Insiders managing this process to move Opco FF&E to Propco at the expense of Opco. Another concern is that Opco money may be spent improving or maintaining FF&E then located at Propco, while deferred maintenance problems continue to increase at Opco casinos.

Similarly, the phone system "reengineering" to accommodate Propco can be done either fairly or unfairly to Opco, and there appear to be insufficient safeguards for Opco here as elsewhere. Disruption of phones at Opco to accommodate Propco could directly impact the value and profitability of Opco.

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[39] *See* Farlin Decl., ¶ 20.

[40] *See* Larson Decl., ¶ 12.

Items 12 & 15: Corporate FF&E/Headquarters Building. The Debtors must itemize the items of art, vehicles, computer equipment, and other tangible property that is "located" [as of when?] at their corporate headquarters. Why should the Opco buyer have to replace Opco laptops, computers, and other equipment, merely because the Debtors' insiders claim that the equipment "belongs" in the Opco corporate headquarters building? Propco's contemplated assumption of the modified office lease is not adequate compensation for such a blanket shift of Opco's assets to Propco, especially since the landlord's claim does not materially dilute the massive unsecured claims in the case against Opco. Moreover, the confiscation of Opco's corporate phone number is especially outrageous and reveals that the true intent of New Propco is to become New Opco in everything but the name.

Item 14: Net Working Capital. Propco wants an offsetting dollar-for-dollar credit for liabilities Propco assumes, even if those liabilities are unsecured prepetition claims on which Opco would pay little. Again, what happens in the Opco contracts and assets not exclusive to Propco? Apparently, once again, Propco only cares about its interests, without any fair thought to the impact or rights of Opco.

For the reasons described above, the Excluded Assets are of great significance to the Opco enterprise. By withholding those assets from an Opco auction sale, the Debtors are most certainly not maximizing value for their estate. If the Court is inclined to allow the Excluded Assets to be excluded from the auction, then at a minimum, before the Bidding Procedures are approved, the Court should require the Debtors to (i) disclose the material details about each of the Excluded Assets to the Debtors' creditors (including the insider windfalls), and (ii) demonstrate that Propco is providing the Debtors' estate with the fair market value of such assets and/or the cost to Opco of developing the asset to its current state, thereby ensuring that Propco and the Insiders do not receive a windfall.

B. The Bidding Procedures Foreclose the Debtors from Viable Reorganization Alternatives

Approval of the Bidding Procedures will prematurely lock in the structure of the Plan and limit the estate's reorganization options going forward.

The Debtors make it clear that the goal of their reorganization is to divide the SCI enterprise into two entities — New Propco and New Opco. The Plan ensures that New Propco will have far more than the necessary components to "smoothly" begin its operations upon the Effective Date, including, but not limited to, real property, intellectual property, information technology, and business information. This "smooth" transition is only achieved by causing great harm to Opco, as detailed in the Boyd Declarations. If the Debtors are permitted to carve out the Excluded Assets (as proposed) and transfer those to New Propco, then all that would remain for SCI is to try and sell a diminished and incomplete gaming organization that has lost significant value as a result of the transfer of the Excluded Assets from Opco to New Propco.

A fundamental problem with the Bidding Procedures is that only part of SCI-Opco is for sale, not the entire enterprise, and to the extent that the Bidding Procedures are approved, the Debtors foreclose Opco, their creditors, and parties-in-interest from exploring potential alternate reorganization options that involve selling the entire Opco and/or Opco-Propco estates to an interested party. As a result, the Debtors are not maximizing the value of their estate for their creditors, but instead, are promoting a split of the enterprise that they know is more problematic for a non-Insider buyer than it would be if the enterprise were sold as a whole. In *In re Am. Dev. Corp.*, the court did not permit a debtor to transfer substantially all of its assets to a wholly owned non-debtor subsidiary before the confirmation of a reorganization plan, because the proposed transaction foreclosed other reorganization alternatives. 95 B.R. 735, 739 (Bankr. C.D. Cal. 1989). Objecting parties argued that the transaction was premature, and the debtor's proposal would "lock the estate into a particular course of action without the creditor protections surrounding confirmation of a plan of reorganization." *Id.* If the Bidding Procedures are approved, the allocation of assets among New Propco and New Opco will be fixed, parties-in-interest will lose out on any opportunity to bid for the Excluded Assets and Propco, and the structure of the reorganized entities will have been determined in the Insiders' favor without adequate disclosure even before the Court has an opportunity to determine the adequacy of the Disclosure Statement. In light of the significant impact of the Bidding Procedures on the overall structure of the Plan, the Court must consider whether the Bidding Procedures (as proposed) are

fair and make good sense in the overall context of the reorganization process. *See In re Public Serv. Co. of New Hampshire*, 90 B.R. 575, 581 (Bankr. D.N.H. 1988). Boyd believes that the answer is "no," and suggests that the Debtors' estate will be best served by making all of the Debtors' assets available for sale, thus allowing the Court to consider offers for either all or part of the current enterprise.[41]

Even if the Debtors had intended to reorganize as a stand-alone enterprise, the only way to maximize the value of the estate is to market all of the estate's assets and then solicit interest for a reorganization structure that will provide the highest and best value for creditors.

C. The Bidding Procedures Must Be Highly Scrutinized Because They Are Being Proposed by the Debtors and Sanction a Transfer of Assets to the Insiders, Especially Without Full Disclosure

The Bidding Procedures are the first step in a going concern sale process that is predicated on transferring assets of significant strategic and economic value to New Propco without exposing such assets to a competitive auction process and adequate disclosure. As part of its analysis of the Bidding Procedures, the Court should evaluate whether it is in the creditors' best interests and consistent with the Debtors' fiduciary duties for the Excluded Assets and the Propco Assets to be withheld from the proposed sale. In light of the fact that the Excluded Assets are to be transferred to the Insiders, it is not appropriate for the Court to defer to the Debtors' business judgment,[42] especially with inadequate disclosure, as demonstrated in the Boyd Declarations. Instead, the Court's review of the proposed transaction must be one of heightened scrutiny. *See In re Bidermann Indus. USA, Inc.*, 203 B.R. 547, 551 (Bankr. S.D.N.Y. 1997), *quoting C&J Clark Am., Inc. v. Carol Ruth, Inc.* (*In re Wingspread Corp.*), 92 B.R. 87, 93 (Bankr. S.D.N.Y. 1988) ("sales to fiduciaries in chapter 11 cases are not *per se* prohibited, 'but [they] are necessarily subjected to heightened scrutiny because they are rife with the possibility of abuse.'").

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[41] *See* Reynertson Decl., ¶ 17.

[42] Ordinarily, a debtor will be authorized to sell assets outside the ordinary course of business pursuant to 11 U.S.C. § 363 or in connection with confirmation of a plan of reorganization if the debtor can demonstrate that the sale is being done for a sound business purpose. *See Computer Sales Int'l, Inc. v. Fed. Mogul (In re Fed. Mogul Global, Inc.)*, 293 B.R. 124, 126 (D. Del. 2003).

When a debtor proposes to transfer its assets to an insider, the debtor must fully disclose to the court and creditors the relationship between the buyer and seller, the circumstances under which the negotiations have taken place, any marketing efforts (i.e., did the debtor seek other buyers), and the factual basis upon which the debtor determined that price was reasonable or adequate. *U.S. Small Bus. Admin. v. Xact Telesolutions, Inc.* (*In re Xact Telesolutions, Inc.*), No. Civ. A. DKC 2005-1230, 2006 WL 66665, at *6-7 (D. Md. Jan. 10, 2006); *In re Wilde Horse Enters, Inc.*, 136 B.R. 830, 842 (Bankr. C.D. Cal. 1991). Therefore, before the Court approves the Bidding Procedures, it should first be satisfied that a transfer of the Excluded Assets to New Propco will maximize value for the Debtors' estate; otherwise, the Court must make all of the assets of Opco available to the market after full disclosure in order to ensure that the Debtors are getting the highest and best price for such assets. As the Boyd Declarations demonstrate, there are many important issues that the Debtors have failed to address.

1. The Insiders Are the Sellers, Co-Stalking Horse Bidder and Arbiters of a Process That Involves a Transfer of Assets to the Debtors' Principals

The Bidding Procedures provide, *inter alia*, that the Debtors "under the direction of SCI's independent director" (after consultation with the Consultation Parties) (i) shall not only decide whether a Potential Bidder is a Qualified Bidder, *see* Section K.7, (ii) but shall also have the right to exclude a bid for the Opco Properties that, in the Debtors' business judgment, does not conform to one or more of the bid requirements, *see* Section N.3, and (iii) shall make the determination of the Successful Bid and Alternate Bid at the conclusion of the Auction, *see* Section S. The amended Bidding Procedures also provide that the Propco Lenders and Fertitta Gaming, LLC (a newly formed entity owned by Frank J. Fertitta (SCI's Chairman of the Board, Chief Executive Officer and President) and Lorenzo J. Fertitta (SCI's Vice Chairman of the Board of Directors and a director)) will be designated as the Stalking Horse Bidder for the Opco Properties. *See* Section D. This scenario presents a significant conflict of interest and taints the entire sale process.[43] It is especially offensive and disconcerting that the Fertittas do not believe

[43] *See* Reynertson Decl., ¶ 18.

that it is appropriate to remove themselves from SCI's Board of Directors even though they are directly involved in every aspect of this sale process.[44]

Under such circumstances, it is highly questionable whether the Debtors can truly be impartial and fair in their decisions, especially since every one of the Debtors' insiders benefits from the Plan. The Bidding Procedures provide that Dr. James E. Nave, an independent director, will be involved in the process, but he will not be the only person who decides which entity will be designated the Successful Bidder. Instead, the decision will ultimately be made by the Debtors, whose board of directors is led by the anticipated co-owners of New Propco and participants in the going concern sale of the Opco Properties. Any sale process in which the Debtors' fiduciaries are involved on both sides of the transaction and retain such a great degree of discretion to make unilateral decisions that will shape the outcome of this reorganization proceeding must be modified in order to ensure that a truly impartial and independent arbiter is involved;[45] otherwise, all third parties start off at a significant disadvantage vis-à-vis potential bidders, such as the Stalking Horse Bidder.[46] Moreover, judging by the decisions of the so-called independent decision makers thus far in the reorganization process who have uniformly favored Propco (now locked up by the Insiders), Opco creditors have reason to question both the impartiality and judgment of the independent decision makers. The appearance of impropriety by itself can chill bidding in such a process.[47]

The most recent and offensive example of impropriety manifested itself in the amended Bidding Procedures. Section C.1 provides that "the Opco Group is offering for sale all or substantially all of the Opco Properties *other than* the Excluded Assets. The Excluded Assets will not be included in the Sale." (emphasis added) However, Section C.2 provides, in pertinent

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[44] By way of comparison, in advance of announcing an equity capital commitment between his investment fund, Pershing Square Capital Management, L.P. ("Pershing") and General Growth Properties, Inc. ("GGP"), Pershing's CEO, William A. Ackman voluntarily resigned from GGP's Board of Directors. *See* General Growth Properties, Inc., Current Report (Form 8-K) (March 11, 2010).

[45] *See In re Fontainebleau Las Vegas Holdings, LLC*, Case No. 09-21481, Docket No. 770 (Bankr. S.D. Fla. October 14, 2009) (examiner appointed to supervise assets sale); *In re Asarco LLC*, Case No. 05-21207, Docket No. 7430 (Bankr. S.D. Tx. April 16, 2008) (assigning examiner to monitor plan sponsor selection process).

[46] *See* Reynertson Decl., ¶ 19.

[47] *See* Reynertson Decl., ¶ 12.

part, that "the Excluded Assets are included in the Stalking Horse Bid." (emphasis added) The Debtors must explain how assets not available to any other bidder can be included in the Stalking Horse Bid. If the Court allows the Excluded Assets to be included in the Stalking Horse Bid, then all parties-in-interest must be allowed to bid for the Excluded Assets; otherwise, the only way to have an "apples-to-apples" auction is to deduct the assigned value of the Excluded Assets from the Stalking Horse Bid.

2. The Plan Structure Is Driven by the Self-Interests of the Debtors' Principals

The Disclosure Statement discloses to the Court and the creditors that the Propco Lenders will sell 50% of the equity in New Propco[48] to an affiliate of Fertitta Gaming. However, the Disclosure Statement fails to provide any color about this arrangement. The devil is in the details, and the pertinent details lie in the support agreements (the "Support Agreements") between and among the Propco Lenders, the Mezzco Lenders, the Swap Counterparty, Fertitta Gaming ("FG"), and the Fertittas.

The Support Agreements include: (A) the Memorandum of Understanding,[49] dated as of March 23, 2010,[50] between and among: (i) Fertitta Gaming, the Fertittas, FJF Investco, LLC ("FJF Investco"), LJF Investco, LLC ("LJF Investco"), and FCP Class B Holdco LLC ("Class B Holdco," together with the Fertittas, FJF Investco, and LJF Investco, the "Fertitta Parties"); (ii) FC Investor LLC ("FC Investor"), Thomas Barrack, Jr. (solely in his capacity as an equityholder of VoteCo, as managing member of Colony Capital, LLC, as a director of SCI and a manager of FCP, "Barrack"), and any affiliate of Colony Capital LLC that may be added to this MOU by way of a joinder (such affiliates together with FC Investor and Barrack, "Colony" or the "Colony Parties"); and (iii) Colony Capital, LLC ("Colony Capital") (solely for the purposes of

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[48] In fact, the Fertittas will hold 50% of the equity in the parent company ("Propco Holdco") of New Propco.

[49] The Disclosure Statement briefly mentions that certain non-debtor parties, including the Fertittas, have entered into support agreements outlining the terms and conditions of their agreement to support the Plan, *see* Disclosure Statement, p. 2.

[50] The MOU and PSA (defined herein) were each contained in a Schedule 13D/A filing that disclosed the support agreement and MOU — the filing was a joint filing by (i) FJF, (ii) LJF, and (iii) FCP Voteco.

giving releases); and (B) the Propco Plan Support Agreement (the "PSA"), dated as of March 24, 2010, between and among Fertitta Gaming, the Fertittas, the Propco Lenders, and Deutsche Bank AG.

The PSA generally outlines the terms and structure of the Plan and memorializes the commitments by each of the parties thereto to support the Plan and not take any actions that could threaten confirmation and consummation of the Plan. The MOU provides, in pertinent part, for the Fertittas to receive releases from Colony for all claims involving, directly or indirectly, (i) the 2007 Transaction, (ii) any contract, agreement, document, or obligation pursuant to which any of the Fertitta Release Parties (as defined in the MOU) owes, is bound to, or subject to any obligation or duty to any of the Colony Releasing Parties, (iii) the Plan and any transactions described in the Plan, or (iv) any prior transactions referenced in the MOU. More importantly, if the MOU is terminated, then the Fertittas and others will not get their releases. Accordingly, the Fertittas and all other released parties are incentivized to ensure that a termination event (as such term is defined in the MOU) never occurs, and that the parties to the PSA only pursue a stand-alone plan consistent with the Propco Plan Term Sheet (as such term is defined in the MOU).

3. The Debtors Did Not Market Propco or the Excluded Assets or Make Adequate Disclosures

"In selling property of the estate, a [debtor] is required to market the property in the manner that is customary for property of the kind at issue." *In re Mama's Original Foods, Inc.*, 234 B.R. 500, 503 (Bankr. C.D. Cal. 1999). The best way to determine a property's market value is to expose such property to the marketplace. *Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999). In the end, the property's market value will be "the highest price a willing buyer would pay and a willing seller would accept, both being fully informed, after the property has been exposed to the market for a reasonable period of time." *Mama's Original Foods*, 234 B.R. at 504.

Neither the Disclosure Statement nor the Bid Procedures Motion discusses the Debtors' efforts to market Propco or the Excluded Assets with full disclosure before deciding to transfer them to New Propco without competitive bidding. Moreover, the Debtors do not explain why the

Excluded Assets should not be put up for auction with full disclosure. The Debtors' justification for transferring the Excluded Assets without exposing them to the market is that they are simply listening to the desires of the Propco Lenders. *See* Motion, ¶ 10. The interests of the Opco creditors are not best served by conveying assets, such as Propco, Opco's IT system, intellectual property, the Wild Wild West real property, Unencumbered FF&E, and Corporate FF&E, to the Propco Lenders simply because they made such a request to the Debtors. It is very possible that a third party, other than the Propco Lenders (i.e., Boyd), might have an interest in such assets and be willing to pay more than the Propco Lenders for such assets. In February 2009 and December 2009, Boyd made two offers to SCI to purchase its assets, and neither offer was accepted. In fact, the Debtors did not even engage Boyd in any substantive follow-up discussions on either of those offers; instead, the Debtors simply stated that they were not taking any steps towards pursuing a sale of substantially all of SCI's assets and instead would be moving ahead with the contemplated restructuring of their debt.[51] We now know that the Debtors were only interested in pursuing an insider transaction at the expense of their creditors' interests in breach of the board's fiduciary obligations. The Court should not sanction the Debtors' ongoing blatant disregard for the creditors' interests by approving these one-sided Bidding Procedures.

4. The Debtors Do Not Disclose the Consideration for the Excluded Assets and Other Relevant Facts, Such as the Harm to the Remaining Opco Business After the Loss of Such Excluded Assets

Finally, the Debtors do not even disclose to the Court or the creditors the consideration being provided by the Propco Lenders for the Excluded Assets or the likely harm to the remaining Opco businesses. Instead, creditors are told that the terms of the New Propco Purchase Agreement will be included in a Plan Supplement.[52]

Therefore, after closely scrutinizing the Bidding Procedures and examining the underlying facts, it is readily apparent that the Bidding Procedures are flawed and cannot be approved. These procedures are not crafted in a manner that will benefit the estate and protect the Opco creditors. Instead, the Bidding Procedures are drafted in order to facilitate a reorganization plan

[51] Station Casinos, Inc., Current Report (Form 8-K) (Mar. 3, 2009).

[52] *See* Disclosure Statement, p. 56.

negotiated by conflicted insiders whose apparent motivation is to protect their own interests, not maximize value for Opco's creditors. This becomes abundantly clear when the Court reads the Boyd Declarations as to the impact of removing the Excluded Assets from Opco.

D. The Bidding Procedures Must Be Denied Because They Chill Bidding and Favor the Insiders

Bid procedures must not chill the receipt of higher and better offers and must be consistent with the seller's fiduciary duties. *See, e.g., Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.)*, 181 F.3d 527, 535, 538 (3d Cir. 1999) (rejecting bidding procedures that included a break-up fee on the grounds that it would "'not induce further bidding or bidding generally', but would 'unnecessarily chill[] bidding and potentially deplete[] assets that could be better utilized to help fund a plan of reorganization . . .'") (citations omitted). In addition, when a close relationship exists between the debtors and certain parties-in-interest who are involved in a bankruptcy sale, the Court must be particularly cautious about approving bidding procedures that would favor one of those parties-in-interest.

In *In re Yellowstone Mountain Club, LLC*, the holder of substantially all of the debtors' equity was personally indebted to the debtors' DIP lender, and the DIP lender was instrumental in selecting the company then employed by the debtors to oversee all services at the Yellowstone Club. No. 08-61570-11, 2009 WL 982233, at *5 (Bankr. D. Mont. Feb. 18, 2009). As a result, the court was very cautious about approving bid procedures that would favor the DIP lender to the detriment of other parties in the case. The court ultimately held that the bid procedures did not encourage third-party bids, but rather, were drafted in such a fashion as to ensure that the DIP lender would be the successful purchaser of the Yellowstone Club. *Id.*

As discussed in Section C of this Objection, there is a very close relationship between the Debtors and Fertitta Gaming (the co-Stalking Horse Bidder). Therefore, the Court must be wary of the following artificial impediments incorporated into the Bidding Procedures that are intended to improve the probability that the Propco Lenders / Fertitta Gaming will be the successful purchaser of the Opco Properties over all other parties.

1. Opco's "Operating System" Is Among the Excluded Assets

A computer cannot properly function without its operating system. Similarly, a casino cannot properly operate if it does not possess the required business infrastructure elements. In light of its extensive experience operating casinos in the Las Vegas local market, Boyd submits that Opco's value will be significantly hampered if the Excluded Assets are carved out from Opco's going concern sale.[53] Individually, the Excluded Assets may or may not have significant economic value, depending on the particular asset. However, many of the Excluded Assets are strategic, because they are critical components of a larger, more complex business management system. When synthesized to support a gaming operation, the collective value of those Excluded Assets becomes greater than the sum of its parts, as explained in the Boyd Declarations.[54]

If the Court approves the Bidding Procedures (in its current form), only the "shell" of Opco will be available for sale, because the "brains" of the gaming operation (i.e., intellectual property, information technology, business information, etc.) will be excluded and transferred to New Propco. If an Opco non-insider bidder must first acquire the necessary infrastructure in order to allow the Opco Properties to start generating revenue, then that party is handicapped going into the auction and starts off at a significant disadvantage as compared to New Propco.[55] Under the current terms of the Bidding Procedures and the Plan, New Propco is the only party who would have the immediate capability to extract value from SCI's assets, because it will be the only party that possesses the missing puzzle piece (i.e., the critical business infrastructure components).[56] Propco (now that it's been locked up by the Insiders) is doing to Opco exactly what Propco complained about in the First Compromise Agreement. However, Propco's harm to Opco is far worse and cannot be justified; these Excluded Assets are owned by Opco and paid for by Opco creditors. If the Excluded Assets are allowed to remain outside the scope of Opco's going concern sale and are not available for third parties to acquire with other Opco assets, then

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[53] *See* Reynertson Decl., ¶ 13-16.

[54] *See* Reynertson Decl., ¶ 13-16.

[55] *See* Reynertson Decl., ¶ 13.

[56] *See* Reynertson Decl., ¶ 13.

the entity that possesses those Opco assets (i.e., New Propco — owned by the Propco Lenders and Fertitta Gaming) will have a significant advantage over all other non-insider parties.

2. The Debtors Will Not Resolve "Interdependencies"

The Debtors provide interested parties with the option of submitting either (i) bids for all or any portion or portions of the Opco Properties or (ii) Joint Bids for all, substantially all, or portions of the Opco Properties.[57] However, the Bidding Procedures also provide, in pertinent part, that "[t]he Debtors do not intend, and shall not be required to undertake any obligation, to resolve any Interdependencies (as such term is defined in the Bidding Procedures) among the various Opco Properties." *See* Bidding Procedures, Section E.3. When they were defending the Master Lease Compromise Agreement, the Debtors argued that, "SCI further believes that, as a licensee of the State of Nevada, it would be required to assist in an orderly transition to a new licensed operator or face significant adverse regulatory action if it failed to do so . . ."[58]

If the Interdependencies inhibit the orderly transition of the Opco Properties to a new licensed operator, then why are the Debtors not willing to do what they previously committed themselves to do in the context of the prior Master Lease Compromise Agreement? The Debtors' blatant refusal to resolve the Interdependencies is nothing more than a means potentially to dissuade non-insider third parties from participating in an auction for the Opco Properties. And by creating yet another barrier for outsiders to participate in the auction, especially without adequate disclosure, the Debtors minimize outside competition for the Opco Properties and increase the probabilities that the Insiders will be the successful bidder for the Opco Properties.

3. The Successful Bid Must Be Irrevocable for Six Months

Section N.1(b) of the Bidding Procedures provides, in pertinent part, that a Qualified Bidder must represent to the Debtors that its Qualified Bid, if chosen as the Successful Bid, will be irrevocable for a period as long as six (6) months. However, the Bidding Procedures do not provide any mechanisms that would assure the Successful Bidder that the assets it agreed to

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[57] *See* Bidding Procedures, Section E.1.

[58] *See* Debtors' Reply to Objections to Debtors' Joint Motion For Entry of An Order Approving Master Lease Compromise Agreement [Docket No. 685, December 9, 2009], pp. 10-11.

purchase will be adequately preserved by the Debtors' insider competitors during the time from the close of the Auction to the close of the sale. Moreover, the Bidding Procedures do not provide any protections for the Successful Bidder, such as releasing the Successful Bidder from its obligations, if there is a material change of events that alters the fundamental deal terms (even if caused by the Insiders hoping to chase off the Opco buyer). As a result, the Successful Bidder will have to incur the cost of maintaining regular oversight over the Opco Properties during the interim period, with limited access and protections, absent a creditor plan or other buyer protections against the Insiders, and those chosen by the Insiders, to oversee Opco until the closing in January 2011. Currently, the only party who has the capability to oversee the assets on a daily basis would be Fertitta Gaming. Therefore, the Bidding Procedures create a further imbalance by requiring outside bidders to incur a potentially extraordinary cost if they become the Successful Bidder — a cost that would not have to be similarly incurred by an entity such as Fertitta Gaming.[59]

4. The Bidding Procedures Promote a Truncated Sale Process That Will Not Benefit the Debtors' Estates

Section K.4 of the Bidding Procedures provides that Potential Bidders must submit their LOI and related materials to the Debtors no later than thirty (30) days after the date of the entry of the Bidding Procedures Order. The Debtors commit themselves to determine, as promptly as practicable after a Potential Bidder delivers its bid materials, whether a Potential Bidder is a Qualified Bidder. Based on recent representations to the Court, the Debtors intend to go forward with a confirmation hearing on the Plan on or about July 15, 2010.[60] The Debtors will only have approximately six (6)[61] weeks from receiving LOIs to (i) identify Qualified Bidders, (ii) allow Qualified Bidders to review additional due diligence, (iii) have Qualified Bidders submit their Qualified Bid materials (*see* Bidding Procedures, Section N), (iv) select Qualified Bids,

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[59] *See* Reynertson Decl., ¶ 25.

[60] *See* Debtors' Motion for Order Pursuant to 11 U.S.C. § 1121(d) Further Extending the Exclusive Period Within Which Debtors May Solicit Acceptances to Joint Plan of Reorganization [Docket No. 1172, filed April 7, 2010].

[61] Assuming arguendo that the Bidding Procedures Order is entered on May 5, 2010.

(v) conduct an auction (which, according to the Debtors, is to occur "shortly before the confirmation hearing on the Joint Plan"),[62] and (vi) negotiate and finalize the Purchase Agreement with the Successful Bidder.

Boyd respectfully submits that the Court take judicial notice of the process presently before the U.S. Bankruptcy Court, Southern District of New York in which General Growth Properties, Inc.[63] outlined a timetable for marketing its assets and identifying a plan structure that creates the greatest value for its creditors and equityholders. More specifically, GGP is running a process in which it will consider offers for either a stand-alone reorganization or a sale of substantially all of its assets to a third party. In either case, parties-in-interest will have to adhere to a timetable that provides for the following: (i) ten (10) days for the Debtors to decide if first-round bidders advance to a second round of diligence, plus (ii) approximately five (5) weeks to do additional due diligence and submit their "final" bid, plus (iii) approximately fourteen (14) days to allow the Debtors, in conjunction with the statutory committees and their respective professionals, to evaluate and decide on the winning bid, plus (iv) approximately sixteen (16) days to negotiate final documentation, and file a plan and disclosure statement.[64] In sum, GGP proposes to give itself approximately ten to eleven (10-11) weeks to get from the point of receiving first bids to the point when the deal documentation is finalized, whereas the Debtors have chosen to only give themselves six (6) weeks to do the same. Given the sheer size of and complexities associated with the Opco Properties and the Excluded Assets, Boyd suggests that the Debtors are doing themselves and their creditors a grave injustice by trying to cram the sale process into a six-week timeframe.[65] Moreover, this consolidated sale process provides further evidence that the Bidding Procedures are a part of a severely flawed process that is designed solely to convey certain strategic and economically valuable assets to the Insiders.

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[62] *See* Bid Procedures Motion, ¶ 19.

[63] Case No. 09-11977 (ALG).

[64] *See* Case No. 09-11977 (ALG), Docket No. 4874 (March 31, 2010).

[65] *See* Reynertson Decl., ¶ 23.

E. The Bidding Procedures Give the Insiders Too Much Control Over the Outcome of the Sale Process with Too Little Disclosure

Nearly forty-five years ago, Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit said that "[t]he conduct of bankruptcy proceedings not only should be right but seem right." *Knapp v. Seligson* (*In re Ira Haupt & Co.*), 361 F.2d 164, 168 (2d Cir. 1966). Throughout this Objection, Boyd has highlighted for the Court why the Bidding Procedures are not right. In addition, the Bidding Procedures do not seem right because, among other things, they permit the Debtors to exercise too much control and discretion over the sale process while providing an insufficient amount of disclosure to the Court and their creditors. For example, Section F of the Bidding Procedures provide that:

> [a] Potential Bidder that desires at any time to contact (whether in person or telephonically) the Committee, the Opco Agent Agent, any member of the Opco Lender Steering Committee or the Propco Lenders or their respective advisors to discuss the terms of any bid made or to be made, such Potential Bidder shall coordinate such contact through the Opco Debtors' advisors (who shall promptly act on such request to facilitate such contact).

There is no justifiable reason for the Debtors (and persons chosen by the competing Insiders) to have such overly broad and unfettered control over the communications between and among the different interested parties in these cases.[66] In fact, the Debtors already have a built-in protection in the Bidding Procedures to guard against possible wrongdoing by potential bidders. *See* Bidding Procedures, Section R.1(b) ("Each Qualified Bidder shall be required to confirm that it has not engaged in any collusion with respect to the bidding or the Sale"). The Debtors must explain to the Court how the estate's value will be maximized by requiring the Debtors to facilitate such communications, rather than allow the parties-in-interest to freely discuss bid-related matters amongst themselves.

In addition, the degree of discretion given to the Debtors (and persons chosen by the competing Insiders) to withhold due diligence from a Qualified Bidder is entirely inappropriate.[67]

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[66] *See* Reynertson Decl., ¶ 22.

[67] *See* Reynertson Decl., ¶ 24.

For example, the Bidding Procedures provide, in part, that Qualified Bidders may obtain from the Debtors such information as the Qualified Bidder may reasonably request so long as the "Debtors, in their reasonable business judgment, agree after consultation with the Consultation Parties and subject to competitive or other business considerations . . ." *See* Bidding Procedures, Section L.2. Boyd recognizes that there might be certain types of information that SCI might not want a competitor to have for antitrust reasons, but beyond that, a qualified bidder, including a competitor of the Debtors, should have broad access to the Debtors' books and records so that it can fully evaluate the Debtors' business and prepare a fully vetted offer for the Opco Properties.

Finally, the exhaustive criteria to be used by the Debtors when evaluating competing bids includes "the claims likely to result from or be created by such bid in relation to other bids." *See* Bidding Procedures, Section O.1. This overly broad and subjective provision provides the Debtors with too much latitude to marginalize a potentially superior bid from a competitor. Debtors may certainly consider the risks associated competing bids, but this provision is difficult to interpret and will frustrate the bidding, rather than promote a competitive atmosphere. Therefore, the Debtors should be required to clarify the exact meaning of this provision.

IV. CONCLUSION

In summary, Boyd Gaming Corporation respectfully requests that the Court deny, without prejudice, the relief being sought by the Debtors in the Bid Procedures Motion. However, if the Court is inclined to grant the Bid Procedures Motion, then, at a minimum, the Debtors must modify the Bidding Procedures in such a way that requires more disclosure and does not (i) chill bidding, (ii) favor insider bidding parties, (iii) foreclose the possibility of confirming a reorganization plan other than the plan presently before the Court, (iv) limit potential bidders to only purchase assets other than the Excluded Assets, (v) allow Insiders, and those who they have chosen, to run the process in their discretion, and (vi) allow the Stalking Horse Bidder to include in its bid assets not otherwise available to non-insider third parties.

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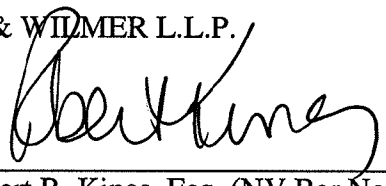
DATED this 21st day of April, 2010.

SNELL & WILMER L.L.P.

By: 

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